No. 14,122

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER W. JOHNSON COMPANY,
Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Appellee.

Appellant's Opening Brief

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JURISDICTION

Reconstruction Finance Corporation, plaintiff below, herein referred to as RFC, filed Complaint to Foreclose Indenture and Chattel Mortgage (Tr. 3). It invoked Federal jurisdiction on grounds of the amount in controversy and as arising under the Reconstruction Finance Corporation Act (USCA Title 15, Pars. 601-607) (Tr. 3-4). Defendant and appellant Walter W. Johnson Company, a

Nevada corporation, herein referred to as Johnson, filed its answer to the complaint, which included its counterclaim against RFC (Tr. 74). Jurisdiction on the counterclaim was invoked on the ground of the amount in controversy and on the ground that Johnson was a Nevada corporation, whereas plaintiff was a Federal corporation (Tr. 77). RFC filed its answer to Johnson's counter claim, admitting the jurisdictional allegations (Tr. 91). The jurisdictional facts were also admitted in the Agreed Statement of Facts (Tr. 176).

RFC filed its motion pursuant to Rule 56 for a summary judgment in its favor dismissing each and all the counterclaims asserted by Johnson on the grounds that there was no genuine issue as to any material fact, and that RFC was entitled to have judgment on each and all of said counterclaims as a matter of law (Tr. 173). An Agreed Statement of Certain Facts, Interrogatories and Answers Thereto, Requests for Admissions and Replies Thereto, the deposition of Walter W. Johnson and four affidavits, having been filed, the court below rendered its Memorandum Opinion and Order on Johnson's counterclaim granting plaintiff's motion for a summary judgment dismissing all of Johnson's counterclaims (Tr. 243-274). Thereupon, final judgment on counterclaim was entered (Tr. 275-276) from which this appeal was seasonably taken (Tr. 278).

STATEMENT OF THE CASE

Johnson's counterclaim against RFC alleges substantially as follows: That in the latter part of 1936, RFC passed a resolution declaring its intention to make a loan to Tuolumne Gold Dredging Corporation, a Delaware corporation, herein called Tuolumne, for the purpose of constructing a gold-dredging machine (Tr. 78); that after the passage of such resolution, Tuolumne negotiated with Johnson for the

construction of the gold-dredging machine, and such negotiations were with the knowledge and approval of RFC (Tr. 78); that on May 11, 1937 Tuolumne executed an indenture and chattel mortgage for the benefit of RFC securing the payment of the principal sum of $600,000 to be used for the purpose of the construction of the dredge and related purposes (Tr. 78) (and see Exhibit A to Complaint—Tr. 17-69); that on the same day, simultaneously with the execution of said mortgage, Tuolumne entered into a contract with Johnson for the construction of the dredge with the approval of RFC (Tr. 78) (and see Exhibit D to Agreed Statement of Facts (Tr. 192) specifying that entire cost of dredge would not exceed $552,500).

The counterclaim then alleges that Johnson completed construction of the dredge on June 15, 1938, and delivery became complete on September 20, 1938 (Tr. 79-80); that at all times until June 15, 1938, there were ample moneys in the Construction Fund established by said mortgage to pay Johnson the balance due for the construction of the dredge (Tr. 80); that in June, 1938, Tuolumne owed Johnson a balance of $51,203.99 on the construction of the dredge and the further sum of $7,815.41 for necessary parts and supplies furnished for the dredge (Tr. 81); that notwithstanding adequate moneys remained to make payment of these obligations from the Construction Fund, Tuolumne and RFC depleted the fund so that on September 24, 1938 there remained only $40,000 therein, which sum Tuolumne and RFC attempted to compel Johnson to accept in full payment of the balance, but which it refused to accept on such condition (Tr. 81); that upon Johnson's refusal to accept said sum, RFC and Tuolumne expended the money for other purposes (Tr. 81).

Johnson's counterclaim further alleges that it then brought action against Tuolumne in the Superior Court for the moneys so due it (Tr. 81). The counterclaim then briefly describes protracted litigation between Johnson and Tuolumne, both in the State courts and in the Federal court, and alleges that it was not until April, 1949, that it was finally determined that Tuolumne was indebted to Johnson for the items in question (Tr. 81-83).

The counterclaim then alleges that at all times RFC had full and complete knowledge of Johnson's performance of the contract, of the moneys due him, of the balances available to pay Johnson in the Construction Fund, etc. (Tr. 83); that, contrary to the express provisions of the RFC resolution and the provisions of the mortgage, RFC, which had complete control over the Construction Fund, caused the balance therein to be delivered for other purposes without making provision for payment to Johnson (Tr. 84); that RFC improperly advanced moneys to Tuolumne for the purpose of contesting and waging the litigation between Tuolumne and Johnson, and aided and abetted Tuolumne in efforts to defeat recovery by Johnson of the moneys due (Tr. 84); and that Tuolumne was insolvent (Tr. 84).

The first four counts of the counterclaim seek recovery on different theories of the following items:

1. Balance of price of building dredge	$ 51,203.99
2. Tools and supplies	7,813.41
3. Interest included in judgment for item 1	5,080.67
4. Interest included in judgment for item 2	712.37
5. Costs in State Courts	365.40
6. Interest since judgment in state court	42,689.25
7. Costs in Federal judgment	1,351.80
Total	$109,216.89

The fifth count of counterclaim alleges that Johnson paid the State of California $9,988.47 as sales taxes assessed on the dredge, for which Tuolumne was expressly liable to Johnson, and for which RFC was also liable to Johnson for reasons previously alleged (Tr. 89).

RFC filed its answer to Johnson's counterclaim admitting the making of the notes and mortgage and the making of the construction contract (Tr. 91-2), but denying the dates of completion and final delivery of the dredge (Tr. 93), denying the various balances due to Johnson for construction of the dredge (Tr. 94), denying the allegations regarding the protracted litigation between Johnson and Tuolumne (Tr. 94-5), denying the fact that Johnson obtained final judgment against Tuolumne, (Tr. 95), denying RFC's aiding and abetting the litigation (Tr. 95), denying that Tuolumne was insolvent (Tr. 95), denying that Johnson was damaged by RFC's action (Tr. 95), and denying the allegations regarding payment of sales tax (Tr. 98).

In addition to these denials, RFC set up the California statute of limitations and laches as affirmative defenses (Tr. 98-9).

The factual showing in the lower court consisted of the deposition of Walter W. Johnson consisting of 166 printed pages (Tr. 281-446); an Agreed Statement of Facts covering limited facts and basic documents (Tr. 176-206); Interrogatories addressed by RFC to Johnson (Tr. 100-113) and Answers thereto (Tr. 114-24); Requests for Admissions addressed by RFC to Johnson (Tr. 124-68), and Answers thereto (Tr. 168-72); and four affidavits filed on behalf of Johnson, to wit, those of Walter W. Johnson, Harley Hise, DeLancey C. Smith and William F. Kelly (Tr. 211-242).

The affidavit of Mr. Johnson showed that he and his company had had many years of experience in constructing gold

dredges (Tr. 213); that until he commenced to build gold dredges under RFC financing, he invariably retained legal title to the dredge until his work was completed and the purchase price was paid (Tr. 213); that when the RFC began to finance gold-dredging operations, it initiated the practice of taking a first mortgage on the dredge, and Johnson Company agreed to relinquish the title it normally reserved in the dredge solely upon condition that the RFC financing and the "Construction Fund" which it provided for would unquestionably see that it was paid (Tr. 213); that in three prior instances of building dredges under this method of RFC financing, Johnson Company received full payment from the Construction Fund established under the RFC trust indenture (Tr. 214).

The RFC was well aware of Johnson's attitude and reliance long before the documents were signed in the instant transaction (Tr. 241, 397, 398). Both the RFC Indenture and the Tuolumne-Johnson construction contract were negotiated and drafted in the offices of the RFC in Washington during three-cornered negotiations participated in by the RFC, Johnson and Tuolumne (Tr. 291, 292). Mr. Johnson dealt with Mr. Morton Macartney, overall chief engineer of the RFC, and also head of its Mining Section (Tr. 292) and with Mr. John E. Norton, Chief Engineer of the RFC Mining Section (Tr. 292). The gist of the transaction was that since Tuolumne was without funds or other assets, save for the value of exploratory work it had done, RFC would provide $600,000 under its Indenture (Tr. 371, 396). The cost of the dredge, $552,500, would thus be paid entirely out of the Construction Fund (Tr. 371, 396). The RFC prepared a list of the expenditures to be made from the Construction Fund established by the Indenture (Tr. 397-398). Tuolumne planned to raise only $50,000 apart from the RFC loan (Tr.

396). Johnson was expected to contribute $10,000 of this $50,000 (Tr. 371). Tuolumne's $50,000 was to be added to the Construction Fund, and thus a total of $650,000 would be subject to RFC control (Tr. 38-39).

Johnson looked to and relied upon the RFC loan for payment of the dredge (Tr. 212, 396-8). Johnson's affidavit states:

> "* * * Upon many occasions during the course of preparation of both documents, it was stated by me and agreed to by others present representing RFC that I was looking for payment to Johnson Company of any money which might become due under the contract solely to the proceeds of the loan to be made by RFC and that I would not enter into such a contract for my company unless the loan was made. It was understood by all present and so stated, including to and by representatives of RFC, that Tuolumne did not have sufficient funds to pay for the construction of a dredge unless a loan was made by RFC which would cover the cost of such a dredge." (Tr. 212-213)

An analysis of the Indenture (Tr. 17-73), together with the construction contract (Tr. 192-206) bears out Johnson's unmistakable reliance upon RFC. The Indenture itself refers to the proposed gold-dredging machine as the "Project" (Tr. 36, 39, 41, et seq.), and contains elaborate provisions as to the manner in which all funds are to be placed in the Construction Fund, over which RFC reserved complete control (Tr. 38, 39, 41). RFC caused payments to be made to the Construction Fund and thence to Johnson Company amounting to $510,000, to and including May 28, 1938 (Tr. 119-120). After this time, RFC caused no further payments to be made because of a dispute raised by Tuolumne as to its legal obligation to pay Johnson the balance of over $50,000 claimed to be due for the dredge (Tr. 214). Mr.

Johnson was advised in November, 1938, that Tuolumne had improperly gotten away with $15,000 of the Construction Fund, but there was a balance of $40,000 remaining in the fund, which would be paid to Johnson Company as soon as it was proper to do so (Tr. 215). In 1939, Mr. Norton, RFC representative, stated that $40,000 was still in the fund which would be kept intact and that McDonald, President of Tuolumne, should not have been allowed to get away with $15,000 of the Construction Fund (Tr. 215).

The excuse given by RFC for not meeting its obligations to Johnson out of the Construction Fund was the lack of finality of litigation between Johnson and Tuolumne which had become extremely complicated (Tr. 216). Even though Johnson obtained judgment against Tuolumne in February, 1940, for $65,175.84, representing the first five items hereinabove mentioned (supra, p. 4) this judgment was not final, and RFC representatives stated that no payment could be made to Johnson Company until the litigation was terminated on an appeal which Tuolumne would take from the judgment (Tr. 216).

The state court litigation is reviewed in *Western Pipe & Steel Co. v. Tuolumne Gold Dredging Corporation,* 63 C.A. (2d) 21 (1944). This litigation began when three actions were filed in the state superior court to enforce individual liens asserted by Johnson's subcontractors against the dredge. Johnson took over the claims of these lien claimants and filed a cross-complaint against Tuolumne for the entire balance due for the dredge, plus the cost of additional tools and supplies. The three actions were consolidated for trial and on February 29, 1940, the superior court entered judgment in favor of Johnson and against Tuolumne for the full amount plus costs and interest to date of judgment. Tuolumne then appealed, asserting numerous technical errors

which allegedly occurred in the trial. The judgment was affirmed March 25, 1944, and petition for hearing by the supreme court was denied April 20, 1944.

In the appellate court's opinion, however, 63 C.A. (2d) 21, at p. 32, reference was made to another action between the same parties, wherein Tuolumne had sued Johnson for alleged defects in constructing the dredge. This suit had been transferred to the federal court, and since it was still pending, the appellate court directed that "until the final determination of the proceeding in the federal court, all proceedings under said cross-complaint against Walter W. Johnson Company, as cross-respondent to said cross-complaint be suspended." Accordingly, Johnson's judgment against Tuolumne in the state court was not then final.

The federal court litigation is reported as follows:

Tuolumne Gold Dredging Corporation v. Walter W. Johnson Company, 61 F. Supp. 62 (D.C. Cal. 1944);
Tuolumne Gold Dredging Corporation v. Walter W. Johnson Company, 71 F. Supp. 111 (D.C. Cal. 1947)

In the first of these decisions, Judge Welsh refused to grant summary judgment in favor of Johnson. In the second decision, however, Judge Lemmon granted Johnson's motion for summary judgment on the ground that the issues raised in the federal court by Tuolumne against Johnson were identical with the issues decided by the State Court as between the same parties. Although Judge Lemmon's decision was dated March 11, 1947, it was not until April, 1949, that Tuolumne abandoned its appeal from Judge Lemmon's decision, so that it was not until this late date that Johnson's judgment against Tuolumne in the state court became final (Tr. 218, 242).

RFC was at all times fully aware of the litigation in both state and federal courts in all its phases (Tr. 242). RFC or its counsel had copies of the pleadings and transcripts in the litigation (Tr. 327, 331). RFC itself advanced funds for the payment of costs, fees and expenses of Tuolumne in the litigation (Tr. 236-7, 242).

While this litigation was pending, Johnson learned not only that the RFC had disbursed the remaining $40,000 of the Construction Fund (Tr. 412), but had loaned an additional $120,000 to Tuolumne, secured by second mortgage on the trust property (Tr. 185). It is an admitted fact that RFC thereafter received and applied the proceeds from the operation of the dredge to the repayment of notes secured by this second mortgage of $120,000, together with interest thereon (Tr. 185). In addition, it is alleged by Johnson (Tr. 88) and denied by RFC (Tr. 97) that RFC appropriated 11 years of earnings of the dredge, and it is a fair inference from the record that such was the fact (Tr. 48, 182-183).

After Johnson learned of RFC's acts in disbursing the balance of the Construction Fund, and in appropriating the proceeds of the operation of the dredge, he again demanded payment from RFC of the moneys due him, but was told that no payment could be made until the litigation with Tuolumne was terminated. His affidavit states:

> "Johnson Company obtained judgment against Tuolumne in February, 1940, and a few months later I was in Washington and talked with Mr. Macartney and Mr. Norton and representatives of the legal department of RFC about paying the judgment which had been obtained. Mr. Norton, at that time, stated, in the presence of Mr. Macartney and myself, that no payment could be made to Johnson Company until the litigation was terminated on an appeal which Tuolumne would take from the judgment." (Tr. 215-6)

But Johnson was not content with these excuses and argued that Tuolumne could not possibly succeed on its appeal and that he was entitled to be paid promptly (Tr. 216). This resulted in extended negotiations in which, however, RFC took the position that they were afraid of the political influence of Mr. McDonald, President of Tuolumne, if they paid Johnson before final determination of the litigation (Tr. 217). This was repeated on many occasions between 1941 and 1947 (Tr. 218).

Mr. Johnson states flatly that RFC promised to pay Johnson Company as soon as the Federal court case was finally determined in Johnson's favor (Tr. 123, 219, 417-419). For example, Mr. Johnson's answer to interrogatory 64 states in part:

> "* * * among other things stated by Mr. McCartney or his subordinates, it was said that if Johnson Company won the appeal from the State Court decision in Stanislaus County, *RFC would arrange that the balance due Johnson Company under the contract would be paid.*" (Tr. 123) (Italics ours)

And in his affidavit, Mr. Johnson stated:

> "* * * Upon many occasions between 1944 and 1947, Mr. Macartney, at the office of RFC at Washington, told me that as soon as the Federal court case was finally determined in our favor, if it was, RFC would arrange to pay Johnson Company." (Tr. 219)

In addition to the fact that RFC intended and promised to pay Johnson the moneys owing to it upon the termination of the litigation, there is evidence demonstrating a continuing willingness of RFC to negotiate a settlement with Johnson. In September, 1938, the RFC offered Johnson $40,000 if it would accept that sum in full payment for the balance claimed by it (Tr. 215). After Johnson obtained judgment

in the Superior Court, one of the legal representatives of the RFC recommended that $65,000 be paid to Johnson (Tr. 217). Still later, in 1947, Johnson's attorney had negotiations with Harley Hise, then a director and later Chairman of the Board of RFC. Mr. Hise conferred with members of the legal staff and received a recommendation from them that the RFC pay Johnson approximately $65,000 in full settlement of its claims (Tr. 227-228, 238). In October, 1949, after the Federal court litigation ended, Johnson's attorney again conferred with Mr. Harley Hise, at which time negotiations on the basis of a $75,000 payment were discussed (Tr. 239). However, at that time, the RFC legal representative stated that he would be unable to recommend a settlement (Tr. 239).

During the pendency of the instant case, negotiations were revived. In June 1951, Johnson had plans to sell the dredge to Lehigh Portland Cement Co. for $225,000, and in this connection RFC formally expressed its willingness to permit Johnson to acquire the dredge at a price which would enable it to receive $70,723.07 "representing the face amount of your judgment and claim for taxes against Tuolumne" (Tr. 224). When that offer proved unacceptable to Johnson, RFC reduced the price of the dredge so that Johnson could have realized approximately $90,000 in payment of its counterclaims (Tr. 226). Unfortunately the proposed transaction collapsed because of RFC's delays in acting on Johnson's proposals (Tr. 220).

Although the negotiations came to naught, they show RFC's continuous recognition of its liability, and Johnson's reliance on the many assurances he received through the years that he would be paid when the Tuolumne litigation ended.

There is not one iota of "evidence" to show that RFC ever at any time intended to assert or rely upon the statute of limitations or laches as a bar to Johnson's claim. To the contrary, the record clearly shows requests that Johnson not press his claim until the litigation ended (Tr. 419). In this connection, Johnson testified:

> "* * * and he (Macartney) said, 'We have no question but what we could meet McDonald in a law suit but,' he said, 'there is a lot of politics enter into this.' *And he was quite urgent asking me to not press the matter until after our case had been decided.*" (Tr. 419) (Italics ours)

From the foregoing, it will be realized that Johnson's claims against RFC are founded upon a broad factual background which began prior to the execution of the 1937 Indenture and continued until as late as 1951, which was the last time RFC recognized its obligation to see that Johnson was paid.

It cannot be the law that when a money lender establishes a trust fund for the purpose of paying a building contractor, and retains complete control over the trust fund, and the building contractor relies upon the trust fund for payment, the lender can later divert the fund to other purposes with impunity. Nor can it be good law that, after the lender diverts such fund, but continues to admit his liability, subject to a dispute between owner and builder as to the balance due, the lender can assert limitations or laches if, when such dispute is settled, the building contractor promptly sues the lender.

These principles do not arise exclusively from the terms of the indenture between the lender and the owner. In the instant case, the indenture was merely a part of the long and continuous relationship between Johnson and RFC.

It is our contention that this factual background involved genuine issues of fact, and that Johnson was entitled to a full trial on the merits and should not have been denied this fundamental right through summary judgment procedure.

No one realized the importance of this factual background more clearly than opposing counsel, who in the early stages of the instant case, not only raised numerous issues of fact, but thereafter took Mr. Johnson's deposition and directed numerous interrogatories to him on the very questions which they now must claim were not "genuine issues of fact."

In taking Mr. Johnson's deposition, counsel devoted approximately 140 pages of the printed transcript (Tr. 283-422) to the most detailed inquiry into Johnson's negotiations and relations with the RFC and its many representatives. Again in counsel's interrogatories many questions were asked as to promises and representations by representatives of the RFC as to payments of the amounts claimed by Johnson (Tr. 100-113). An excellent example of counsel's interest in the facts is brought out by the questions and answers to interrogatories 63 and 64 which we quote in full:

> "63. Q. State whether RFC or any representative thereof at any time requested Johnson Company not to institute legal action against RFC or to delay instituting legal action against RFC."
>
> "A. Yes."
>
> "64. Q. If the answer to question 63 is in the affirmative, and if such request or requests were oral, state with respect to each such request the time, place, persons present, person who made any request, and person to whom any request was made."
>
> "A. Upon many occasions Mr. McCartney and others connected with his Department at RFC made this request, the exact dates and times and persons present, not being within the present memory of John-

son Company. Among other things stated by Mr. McCartney or his subordinates, it was said that if Johnson Company won the appeal from the State Court decision in Stanislaus County, RFC would arrange that the balance due Johnson Company under the contract would be paid. This statement was made many times between 1940 and 1947 by Mr. McCartney and others connected with RFC. It was also said several times, at similar conversations, that RFC was afraid of Mr. McDonald's political influence, or they would arrange to pay without an appeal." (Tr. 112, 123.)

It seems plainly inconsistent, we think, for counsel thus to embark upon the most detailed factual inquiry, and then to urge upon the court that the present case involves "no genuine issue as to any material fact." And it is even more strange that opposing counsel, having drawn from Mr. Johnson the extensive factual background of the transaction, would not see fit to controvert his deposition and affidavits by producing any statement from the RFC officials named by Johnson.

We will shortly point out that the court below, in its memorandum opinion, wholly ignored this factual background.

The single issue before this court is whether the summary judgment was improperly granted inasmuch as there were one or more genuine issues as to a material fact.

We frankly cannot see how this court can fail to hold that the present case is essentially a "fact" case, and that Johnson was entitled to his day in court, and having been denied it, is entitled to a reversal of the summary judgment.

SPECIFICATION OF ERRORS

I. The court below erred by failing to observe the limited scope of a motion for summary judgment. The court's duty was to ascertain whether there were genuine issues as to any material facts, but the court made no attempt to determine this question, and ignoring triable issues, purported to grant judgment "on the merits."

II. The court below erred in holding that Johnson's first cause of counterclaim was barred by limitations. The court ignored evidence clearly showing that the RFC had waived the statute and that it did not begin to run until 1949.

III. The court erred in holding that Johnson had no lien, or if it did that the lien was barred by limitations. In both these respects the court ignored plain and substantial issues of fact.

IV. The court erred in holding that RFC was not unjustly enriched and in ignoring issues of material fact bearing upon the claim of unjust enrichment.

V. The court erred in holding that RFC was entitled to appropriate the proceeds of operating the dredge while Johnson remained unpaid for it. The court failed to consider whether such appropriation constituted a constructive fraud and converted RFC into a constructive trustee.

VI. The court erred in holding that RFC was not liable for payment of sales taxes, since there was a genuine issue of fact on which such liability was predicated.

I.

THE COURT BELOW ERRED BY FAILING TO OBSERVE THE LIMITED SCOPE OF A MOTION FOR SUMMARY JUDGMENT. THE COURT'S DUTY WAS TO ASCERTAIN WHETHER THERE WERE GENUINE ISSUES AS TO ANY MATERIAL FACTS, BUT THE COURT MADE NO ATTEMPT TO DETERMINE THIS QUESTION, AND IGNORING TRIABLE ISSUES, PURPORTED TO GRANT JUDGMENT "ON THE MERITS."

We earnestly believe that the court below misconceived the limited scope of its duties in passing upon the motion for summary judgment. Rule 56c permits the granting of summary judgment only if it is determined that there is no genuine issue as to any material fact. The inquiry on the motion relates to the question whether any such genuine issue exists, not to the weight of evidence bearing upon any issue. If it is determined that one or more such genuine issues exist, there must be a trial on the merits.

As Judge Hutcheson said in *Whitaker v. Coleman,* 115 F. 2d 305, (CCA 5 1940):

> "* * * Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."

Let us turn now to Judge Lemmon's memorandum opinion (Tr. 244-274) and see whether he endeavored to "carefully test out" whether Johnson "really had evidence which he would offer on a trial."

Paragraph 1 of his opinion refers to the Agreed Statement of Facts. This deals almost entirely with the Inden-

ture, the construction contract, the second mortgage, later advances and the status of payments, etc. (Tr. 245-251). It should be clearly understood that this "Agreed Statement of Facts" did not purport to be a complete statement of the whole case, nor was there any stipulation submitting the case for decision on this "Agreed Statement." To the contrary, the motion for summary judgment is in the customary form required by Rule 56, which in turn provides that summary judgment may be rendered:

> "* * * if the pleadings, *depositions,* and admissions on file, *together with the affidavits,* if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Accordingly, if Judge Lemmon conceived that the whole case was submitted on the Agreed Statement, he was mistaken, and that cannot excuse his failure to consider the affidavits, depositions, etc.

Paragraph 2 of the opinion contains a slight indication that the court may have intended to confine its opinion to the Agreed Statement of Facts. Thus, the court says, at page 251:

> "In the Court's view of the issues, and in the light of the Agreed Statement of Facts and the factual recitals contained in the above-mentioned reported decisions, only a brief summary of the present pleadings is here required."

However, the court then proceeds to state that although RFC filed alternative motions, only the motion for summary judgment need be considered (Tr. 252).

In paragraph 3 of its opinion the court holds that the six-year statute of limitations applicable to claims against the United States would apply to claims against RFC (Tr.

253-257). While we think the court erroneously placed RFC on the same footing with the United States, we will not pursue the point here.

In paragraph 4, the court refers to "conflicting views as to when the statute of limitations commenced to run." (Tr. 257) The court then states that these conflicting views "will be evaluated" but does not at this point, or at any other time, refer to the issue of waiver and estoppel to assert limitations.

In paragraph 5, the court holds flatly that whatever right Johnson had to file suit as a third-party beneficiary accrued on September 24, 1938, and was barred (Tr. 260-263). No reference is made here, or elsewhere, to the extensive evidence we have referred to above showing that RFC recognized its obligation to pay, stated that it would pay after the litigation was ended, negotiated to pay the amounts Johnson claimed, and therefore waived and is estopped to assert the statute of limitations.

In paragraph 6, the court holds that if Johnson had a lien, it was extinguished by limitations. The court pays no attention to the facts and circumstances surrounding the 1937 transaction; the court does not consider the crucial question of *intent* to see that Johnson was paid exclusively from the Construction Fund; and as to limitations, the court again applies the Federal statute of limitations to any lien which could have arisen, without considering an issue as to waiver or estoppel.

In paragraph 7, the court holds that "the record contains no suggestion of unjust enrichment attributable to the plaintiff" (Tr. 265-271). In this holding, however, the court itself takes two positions inconsistent with its holding. In the first place, it admitted it was in such doubt as to the extent of Johnson's claims of unjust enrichment that on May

22, 1953, it addressed a letter to both counsel asking whether it was Johnson's intent to rely on any claim other than that alleged to have arisen out of the application of the proceeds from the operation of the dredge to the satisfaction of the second mortgage (Tr. 267). Not having received a satisfactory reply from Johnson's counsel, the court declined to grant Johnson additional time within which to reply. In its own words "in view of the unclear state of the record on the limitations aspect of Johnson's third cause of counterclaim, the court will consider the latter *on its merits.*" (Tr. 268) Clearly a genuine issue of fact existed as to the extent of the appropriations by RFC of the operations of the dredge. Yet the court, without a trial, and without having given Johnson the opportunity to clarify the point, purported to decide it against Johnson "on the merits." Then as a second inconsistency the court said (Tr. 270):

> "The crucial question remains: Was this enrichment 'unjust'?"

The opinion then states that "Johnson has completely failed to establish 'unjust enrichment' on the plaintiff's part" (Tr. 271). How could the court possibly decide the question of "injustice" of the admitted "enrichment" without hearing the facts? By its very nature, such a question would involve all the facts and circumstances under which the enrichment was obtained. The court erroneously said that since Johnson had not "established" these facts, he must lose. We say it is fundamental that he should not have lost without at least having had his day in court.

In paragraph 8 which again deals with unjust enrichment, the court says that it "has likewise *weighed* this fourth counterclaim *on the merits*" (Tr. 272). The court then holds that "there is absolutely nothing in the record to

support a charge of dishonesty on the part of the plaintiff." But all of Johnson's showing raised such serious questions of the propriety of RFC's conduct as to suggest violation of a constructive trust. What more should Johnson have put in the record on summary judgment proceedings?

Lastly, the court summarizes its opinion by stating that the claims of unjust enrichment and fraud "are clearly without foundation *on the merits*. The record discloses neither overreaching nor dishonesty on the plaintiff's part." (Tr. 274) Once again we say, the court's reference to "the record" appears to assume that there was a *record on the merits*. But there having been no trial, there was no such record.

Now, having in mind the facts summarized earlier in this brief, let us ask this court whether Judge Lemmon determined whether a genuine issue of fact existed on any of the following issues. That it was the *intent* of all concerned in the 1936-1937 negotiations that Johnson should be paid in full out of the Construction Fund? That Johnson relied on the Construction Fund as the sole source of payment? That RFC wrongfully disbursed the Construction Fund in violation of Johnson's rights? That RFC nevertheless promised and represented it would pay Johnson? That the reason it gave for not paying it was that the litigation between Johnson and Tuolumne had not become final? That RFC requested Johnson not to press its claim against RFC until that litigation ended? That RFC negotiated for a settlement with Johnson on such basis? That Johnson relied on these negotiations as a waiver of and estoppel to assert the statute of limitations? That a relationship of trust and confidence existed between Johnson and RFC so that the latter became a constructive trustee of all funds in the Construction Fund or of the earnings? That RFC's appro-

priation of the earnings from operations and its uses thereof, under all the circumstances, made this admitted enrichment unjust? That throughout the entire negotiations between the RFC and Johnson, the former's conduct was such as to estop it from asserting a first lien on the dredge and the proceeds of operation therefrom? That, in view of the foregoing unanswered issues, the time when the statute of limitations began to run was also a genuine issue of fact?

There is not one word in the trial court's opinion which mentions these issues of fact. There is no express reason given by the court below for denying a trial on the merits on these issues.

The authorities show that the court fell into the common error of misconceiving its limited powers and duties on motion for summary judgment. In *Whitaker v. Coleman,* supra, an insurance company invoked summary judgment procedure, although there was a question whether the driver of an automobile was an "insured." The insurance company prevailed in the court below, but the appellate court recognized the existence of a genuine issue of fact on the point and reversed the summary judgment, saying:

> "* * * The invoked procedure, valuable as it is for striking through sham claims and defences which stand in the way of a direct approach to the truth of a case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial.
>
> "Judges in giving its flexible provisions effect must do so with this essential limitation constantly in mind. To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force."

The *Whitaker* case, supra, was cited in the leading United States Supreme Court case interpreting Rule 56, viz.:

Sartor v. Arkansas Gas Corp., 321 U.S. 620, 88 L. Ed. 967 (1944).

In that case, the gas company moved for summary judgment on the ground that no genuine issue of fact existed whether the price of natural gas exceeded 3¢, and in this behalf presented numerous lengthy affidavits of supposed authorities on the subject. The plaintiff landowner merely filed the affidavit of its counsel setting forth the history of previous litigation, etc. The trial court and the circuit court of appeals both held that defendant was entitled to the summary judgment, but this holding was reversed on the ground that defendant could not thus deprive plaintiff of its day in court, no matter how much the weight of evidence appeared to be against it. The court said, per Justice Jackson:

> "It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner. The judgment accordingly is reversed."

Just so, in the instant case, Johnson should not have been deprived of his day in court and his right to cross-examine the RFC officials who promised that he would be paid.

In the recent case of *Pacific American Fisheries v. Mullaney,* 191 F. 2d 137, (1951 CCA 9) plaintiff sought an injunction against the enforcement of a 1949 Alaskan statute imposing a tax on nonresident fishermen. The trial court

ordered summary judgment for the defendant Commissioner. This court reversed the judgment on the ground that plaintiff should have been allowed a trial on the merits, and particularly to offer evidence on a disputed issue of fact. The court further said:

> "Because of the importance of the issues presented in this statute, we think it was not one to be disposed of by summary judgment even if proper motions for such judgment had been made or proper opportunity afforded for appropriate showing by affidavit or otherwise."

In several cases decided by the Circuit Court of Apeals for the Second Circuit, the judges have warned of the exceedingly limited nature of the summary judgment procedure: Thus in

> *Doehler Metal Furniture Co. v. United States,* 149 F. 2d 130, 135-136 (CCA 2-1945)

Judge Frank said:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy, time-saving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the principal purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay * * * The District Courts would do well to note that time has often been lost by reversals of summary judgment improperly entered (citing cases)"

And in *Colby v. Klune,* 178 F. 2d 872 (CCA 2-1949) Judge Frank said:

> "We have in this case one more regrettable instance of an effort to save time by an improper reversion to 'trial by affidavit,' improper because there is involved an issue of fact, turning on credibility. Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system. For only in such a trial can the trier of the facts (trial judge or jury) observe the witnesses' demeanor; and that demeanor—absent, of course, when trial is by affidavit or deposition—is recognized as an important clue to witness' credibility. When, then, as here, the ascertainment (as near as may be) of the facts of a case turns on credibility, a triable issue of fact exists, and the granting of a summary judgment is error."

In a case quite similar on its facts to the instant case, (*Begnaud v. White,* 170 Fed. 2d 323) the Court of Appeals for the Sixth Circuit said:

> "The authorities indicate that the trial judge should be slow in passing upon a motion for summary judgment which would deprive a party of his right to a trial by jury where there is a reasonable indication that a material fact is in dispute. Compare Sartor v. Arkansas Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967, where the affidavits of eight witnesses on behalf of the defendant were, under the circumstances in that case, insufficient to authorize the Court to sustain defendant's motion for summary judgment."

In our own state, the California Supreme Court in *Eagle Oil & Refining Co. v. Prentice,* (19 C. 2d 553, 1942) has commented thus on summary judgments:

> "The issue to be determined by the trial court in consideration of a motion thereunder is whether or not defendant has presented any facts which give rise to

a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case * * * If that were not true, controversial issues of fact would be tried upon affidavits by the court and not a jury. Because the procedure is summary and presented on affidavits without the benefit of cross-examination, a trial by jury and opportunity to observe the demeanor of witnesses in giving their testimony, the affidavits filed on behalf of the defendant should be liberally construed to the end that he will not be summarily deprived of the full hearing available at a trial of the action and the rights incident thereto.

The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact." (p. 555)

In his excellent article in *40 California Law Review,* page 204, on "Summary Judgment Under Federal Practice," Judge Yankwich points out that the Circuit Courts of Appeal have declined to allow District Judges to weigh conflicting evidence in passing on motions for summary judgment, saying:

"The fear in Anglo-American jurisprudence of 'Trial by Affidavits' may be the motivation behind this, and the feeling that such trial contravenes the right to have matters of fact decided by jury under the constitutional guaranty." (*40 Cal. Law Rev. P. 224*)

And further, Judge Yankwich concludes:

"Trial judges, especially those in metropolitan areas, confronted with ever increasing litigation, have shown eagerness to use this method of weeding out unmeritorious claims and defenses. At times, they have been restrained by warnings of the courts of appeal. Which brings us back to the fact that absolute simplicity is as illusory and difficult of attainment in procedure as it

is in life. In a complex world, litigation will reflect complexity. Procedural reform may help achieve quick disposition of litigation at times. But the complexity inherent in the material out of which certain litigation arises, the litigious character of the American people, especially of the people of the West, the scrupulous determination of higher courts to have facts determined upon full trial, stand in the way of substituting even so desirable a reform as summary judgment for the average trial. Slow as the judicial process may be at times, I am convinced that peace under law, which is the real object of a lawsuit, can best be achieved by a full-scaled airing of complicated controversies. Summary judgment may achieve limited ends. But if, through a more universal use, it achieved greater immediate objectives, the result might in the long run, be harmful to the democratic process."

See also

Bozant v. Bank of New York, 156 F. (2d) 878 (CCA 2, 1946);

48 Columbia Law Review 780 (1948);

51 Michigan Law Review 1143 (1953).

In conclusion, we respectfully and earnestly submit that Judge Lemmon's opinion shows on its face that he misconceived the function of summary-judgment procedure. The opinion fairly indicates that the court made no effort whatever to ascertain whether any genuine issue of fact existed. The court went even so far as to purport to dispose of entire causes of action "on the merits." The court wholly ignored the extensive factual background of Johnson's claims. The court fell into the error so frequently pointed out by circuit courts of appeals, as well as by the United States Supreme Court, of denying a litigant the right to a

trial on the merits. Johnson had the right to a day in court; to present its case in person to a trier of fact; and to confront its adversaries in open court with cross-examination. Johnson was denied these fundamental rights. Accordingly, the summary judgment should be reversed.

II.

THE COURT BELOW ERRED IN HOLDING THAT JOHNSON'S FIRST CAUSE OF COUNTERCLAIM WAS BARRED BY LIMITATIONS. THE COURT IGNORED EVIDENCE CLEARLY SHOWING THAT THE RFC HAD WAIVED THE STATUTE AND THAT IT DID NOT BEGIN TO RUN UNTIL 1949.

The court below held that, assuming Johnson was a third-party beneficiary of the RFC-Tuolumne contract, then its cause of action must have accrued on September 24, 1938, when RFC diverted the balance in the Construction Fund to other purposes,[1] and accordingly that the six-year statute of limitations on claims against the United States barred Johnson's claim in September, 1944 (Tr. 261).

We contend that the RFC waived and was estopped to assert the statute of limitations, and we refer to the extensive evidence heretofore summarized, wherein it was shown that RFC stated that Johnson's claim would be paid after the litigation ended, and urged Johnson not to press its claim until such time, and led Johnson to believe that its claim would inevitably be settled (supra pp. 8-15).

All that we need to do is to convince this court that there was a genuine issue of fact on this point of waiver and estoppel. If there was, there is nothing that this court can do

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1. We believe the court erred in stating that the Construction Fund became wholly exhausted on September 24, 1938. The record shows that the last $40,000 was paid into the fund on that date, but does not show when the balance in the fund became wholly exhausted.

but to reverse the summary judgment, and send the case back for trial.

Fortunately, we are able to refer to a case which is very similar on its facts to the instant case. In

Begnaud v White, 170 F. 2d 323 (CCA 6-1948)

plaintiff, Commissioner of Banks, sued in 1947 for the unpaid balance of a promissory note dated November 1, 1930. Defendant moved for a summary judgment on the ground that the action was barred by the six-year Tennessee statute of limitations. Affidavits showed that the bar of the statute had been expressly waived from time to time until February 15, 1947. Just before the later date, negotiations took place for a settlement. During the course of these negotiations plaintiff allowed February 15, 1947, to pass by without obtaining a further written extension of the statute. As soon as the date passed, defendant stood on the statute. Plaintiff at first claimed that its failure to obtain an extension was due to inadvertence in its bookkeeping department. This ground would obviously have been insufficient to estop the defendant. Thereafter, however, plaintiff showed through affidavits filed in opposition to the motion for summary judgment that it refrained from filing suit within the statutory period through reliance upon the statement and conduct of the defendant during the negotiations to the effect that he would not raise the statute of limitations. The appellate court held that this showing created a genuine issue as to a material fact, saying:

> "* * * Whether the jury would accept such testimony at its face value or reject it is not the present question. Taking it at its face value on the motion for summary judgment, it clearly puts in sharp issue the defendant's claim that the bank's liquidators did not rely upon the representations and negotiations of White." (*Begnaud v. White,* 170 F. 2d 323, 327).

About the only difference between the above case and the case at bar is that the facts in our case are much stronger. In the cited case, the court said that notwithstanding plaintiff's weak factual showing, those facts had to be taken at face value, and, therefore, entitled the plaintiff to a trial. In our case, we have a wealth of evidence concerning RFC's waiver, its express promises to pay at a later time, and its request that Johnson not press the claim until later. There is no question that these convincing facts created a genuine issue, and it would be grossly unjust to deny Johnson a full trial thereon.

The fact is that the court below did not even consider the doctrine of waiver and equitable estoppel, nor touch upon the evidence directed to this issue. This illustrates further our contention that the court misconceived the limited scope of his powers in passing upon the motion.

In *Adams v. California Mutual B. & L. Association,* 18 C. (2d), 487 (1941), the question arose whether the California Building and Loan Commissioner—a public official—was equitably estopped to assert the statute of limitations in view of the fact that he had assured claimants that payment of their claims would depend on the outcome of other litigation. The court said:

> "The actions here involved are not barred by laches or the running of the statute of limitations. There is uncontradicted evidence in the record that the office of the defendant Building and Loan Commissioner continuously indicated and represented, verbally and in writing, that the decision in the Martin case, which was first instituted and in which pursuant to agreement with him the issues were so framed as to cover the several types of investment here involved, should be determinative of the rights of all persons or groups similarly situated; and that it was in reliance on such rep-

resentations that these suits were not earlier instituted. Throughout that litigation, as the commissioner paid liquidating dividends to investment certificate holders, he would set aside a proportionate amount to be paid to all 'shareholders' should they be classed in that litigation as creditors entitled to parity with investment certificate holders. *Under all of the circumstances, the commissioner is estopped to plead laches or the statute of limitations.* It is well settled that a person by his conduct may be estopped to rely upon these defenses. (*Rapp v. Rapp,* 218 Cal. 505, 509 (24 Pac. (2d) 161); *Calistoga Nat. Bank v. Calistoga Vineyard Co.,* 7 Cal. App. (2d) 65, 72 (46 Pac. (2d) 246); 16 Cal. Jr. 575; 130 A.L.R. 8.) Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense. (*Rapp v. Rapp,* supra; *Miles v. Bank of America N. T. & S. Assn.,* 17 Cal. App. (2d) 389, 398 (62 Pac. (2d) 177).) These principles have been applied to hold a defendant estopped to plead the statute where he represented that he would be bound by the outcome of a pending suit. (*Missouri, K. & T. Ry. Co. v. Pratt,* 73 Kan. 210 (85 Pac. 141); *Daniel v. Edgecombe County* 74 N. C. 494, 130 A. L. R. 8, 60). Plaintiff's actions here were seasonably instituted upon discovery of the commissioner's change of attitude as regards the effect of the Martin litigation upon the rights of other investors in the association." (Emphasis added) (*Adams v. California Mutual B. & L. Association,* 18 C. (2d) 487 (1941)).

To the same effect, see the following recent cases:

Benner v. I. A. C. 26 C. (2d) 346 (1945);

Berkey v. Halm, 101 C. A. (2d) 62 (1950);

Industrial Indemnity Co. v. I. A. C., 115 C. A. (2d) 684.

Another California case of special interest is

Bollinger v. National Fire Insurance Co., 25 C. (2d) 399 (1944)

where the defendant insurance company procured the dismissal of a previous action on the ground it was premature, and then sought dismissal of a second action on the ground that it was barred by limitations. The supreme court of California said, per Justice Traynor:

> "Under the circumstances it would be a perversion of the policy of the statute of limitation to deny a trial on the merits. As the Supreme Court of the United States declared in *Order of R. Telegraphers v. Railway Exp. Agency* (1944), 321 U. S. 342, 348 (64 S. Ct. 582, 88 L. Ed. 788), 'Statutes of limitation * * * in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put an adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to prosecute them. Here, while the litigation shows no evidence of reckless haste on the part of either party, it cannot be said that the claims were not timely pursued.' (See, also, 190 Law Times 303-5). (p. 407)
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> * * * * *
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> "* * * Statutes of limitations are not so rigid as they are sometimes regarded. Under certain circumstances property rights or immunities may be acquired as a result of the running of the statutory period, but the period will be extended or tolled by the occurrence of certain events, which may be the subject of conflicting evidence, such as absence from the state or disability. (Code Civ. Proc., Sec. 351 et seq.) It is established that

the running of the statute of limitations may be suspended by causes not mentioned in the statute itself. (*Braun v. Sauerwein*, 10 Wall. (77 U. S.) 218, 223 (19 L. Ed. 895); *Collins v. Woodworth*, 109 F. 2d 628, 629.) It is settled in this state that fraudulent concealment by the defendant of the facts upon which a cause of action is based (*Kimball v. Pacific Gas & Elec. Co.*, 220 Cal. 203 (30 P. 2d 39)) or mistake as to the facts constituting the cause of action (*Davis etc. Co. v. Advance etc. Works, Inc.*, 38 Cal. App. 2d 270 (100 P. 2d 1067); see 16 Cal. Jur. 505) will prevent the running of the period until discovery. Principles of equity and justice, which moved this court in the Kimball case, supra, to grant relief are likewise controlling here. There is no need to make fine distinctions as to the persons who owe a duty to disclose. The Kimball case involved an employer whose fiduciary obligations to his employees were uncertain. The present case involves an insurer whose duty of good faith in dealing with the insured is well established. (See 13 *Appleman, Insurance Law and Practice* 36; *Vance, Insurance* (1930) 74.)'' (p. 411).

The RFC is not immune from the doctrine of equitable estoppel. It has been repeatedly held that although the RFC is an agency of the Government, Congress has not endowed it with governmental immunity, and it is subject substantially to the same duties and obligations in the courts as is a private litigant.

RFC v. J. G. Menihan Corp. 312 U.S. 81, 85 L. Ed. 595 (1941);

Keifer & Keifer v. RFC, 306 U.S. 381, 83 L. Ed. 784 (1939);

RFC v. Childress, 186 F. (2d) 698 (CCA 8)—1950);

U. S. v. Shofner Iron & Steel Works, 71 F. Supp. 161 (D.C., Ore.) (1947).

Indeed it has been held that the United States itself may be estopped in the same manner as a private party would be estopped where it is acting in a proprietary capacity. Thus, in *United States v. Denver and RGW R. Co.,* 16 Fed. (2d) 374 (CCA 8, 1926), the United States sued in equity for forfeiture of a grant of public lands, but the court held that the Government was estopped from the assertion of its claims. The court said:

> "The equitable claims of the state or of the United States are no stronger than those of an individual under like circumstances, and a state or the United States may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim. *State of Iowa v. Carr* (C.C.A.) 191 F. 257, 266; United States v. Chandler-Dunbar Water Power Co. (C.C.A.) 152 F. 25, 41; United States v. Debell (C.C.A.) 227 F. 775, 779; Rannels v. Rowe (C.C.A.) 145 F. 296, 301; 1 Pom. Eq. Jur. sec. 451." (*U. S. v. Denver RGW R. Co.,* 16 F. 2d 374, 376, 77).

See also:

Dayton Airplane Co. v. U. S. 21 F. (2d) 673 (CCA 6th, 1927);

Branch Banking & Trust Co. v. United States, 98 Fed. Sup. 757 (Ct. Cl. 1951);

The Falcon, 19 F. 2d 1009 (D.C. Md. 1927).

We submit that the doctrine of estoppel is plainly applicable to the instant case. We have shown that in *Begnaud v. White,* supra, it was held on a similar set of facts that the mere assertion by a defendant that he relied on pending negotiations as an estoppel to assert the statute of limitations was sufficient to entitle him to a trial on the merits. We have shown by *Adams v. California Mutual B. & L.*

Association, supra, that a public official of California was equitably estopped to assert the statute of limitations.

We have shown by an abundance of evidence that the RFC waived and was estopped to assert the statute of limitations. It would be a gross injustice to permit the RFC to escape liability in the face of this evidence. In any event, Johnson was entitled to his day in court. There is no substantial basis for denying that a genuine issue of fact was raised on this point. The judgment should, therefore, be reversed on this ground alone.

Before concluding this section of our brief, it should be pointed out that there are at least two important additional grounds on which the court below should not have barred Johnson's claim on the ground of limitations. One of these grounds is that, by its very act in commencing the present action to foreclose its mortgage and by naming Johnson as a defendant in the action, the RFC necessarily waived limitations as to any claims which Johnson had against it arising out of the same transaction. We believe this point is well taken on the authority of

United States v. Capital Transit Co., 108 F. Supp. 348 (D.C. D.C. 1952);

Kimberly-Clark Co. v. Patten Paper Co., 140 N.W. 1066 (Sup. Ct. Wis. 1913);

Bargo v. Bargo, 86 S.W. 525 (Ct. of App. Ken. 1905);

Cannon Livestock Co. v. Fisher, 255 P. 996 (S. Ct. Ariz. 1927);

Mazurk v. Murawska, 78 N.E. 2d 817 (Ill. App. 1948);

Merrill v. Merrill, 215 Ill. App. 602 (1919).

The second additional ground involves conflicting views as to when the statute began to run. It is our contention that, by its practical conduct and attitude toward Johnson,

RFC was in effect a guarantor of collectibility of Johnson's claim at least to the extent that the Construction Fund would have paid such claim had it not been wrongfully depleted. The liability of such a guarantor does not begin to run until the creditor has exhausted his remedies against the debtor.

Swank v. Mortgage Investment Co. of El Paso, Texas, 83 F.2d 868 (CCA 5, 1936);

Citizens Bank v. Seaboard Surety Corp., 4 CA 2d 766 (1935);

Menefee v. Robert A. Klein & Co., 121 CA 294 (1932).

Upon each and all of the grounds hereinabove mentioned, we submit that the court grossly erred in holding that Johnson's claims were barred by limitations.

III.

THE COURT BELOW ERRED IN HOLDING THAT JOHNSON HAD NO LIEN ON THE PROPERTY OF TUOLUMNE, OR IF IT DID THAT THE LIEN WAS BARRED BY LIMITATIONS. IN BOTH THESE RESPECTS, THE COURT IGNORED PLAIN AND SUBSTANTIAL ISSUES OF FACT.

A. Although a contractor waives a lien to secure payment of costs of construction in favor of a lender whose loan is secured by a first mortgage on the property constructed, to the extent that any portion of the loan fund has not been advanced, the unpaid contractor has a first lien on the property.

The court below rejected Johnson's second cause of counterclaim on the merits as follows:

"To recapitulate, then, Johnson's novel claim of a 'vendor's lien' is to be rejected for the following reasons:

1. In the chattel mortgage, Tuolumne warranted

> that it was the owner of the property involved, "free and clear of all liens"; and in the Agreement between Tuolumne and Johnson, the parties declared themselves bound by the chattel mortgage, insofar as it relates to the work undertaken or the payments. * * *
>
> "Accordingly, the Court holds that Johnson has failed to relieve itself of the effect of its admitted surrender of the vendor's lien * * *". (Tr. 265)

It is apparent that the court did not perceive the basis of Johnson's claim on this score; certainly that basis was not discussed in the opinion.

Johnson does not claim a "vendor's lien" or a common law lien based upon possession. Neither does Johnson ground his case upon a mechanic's or other statutory lien or contend that such a lien is normally senior to the first mortgage which patently provides to the contrary. Johnson waived all liens.

This cause of counterclaim, like the balance of Johnson's case, except for the first cause of counterclaim, sounds in equity. It is predicated upon equitable rules of estoppel, upon the maxim that he who seeks equity must do equity, upon the doctrine of unjust enrichment and upon elemental principles of equity and good conscience. None of these were even considered by the Court below. Certainly the many pertinent facts in the record were not discussed; apparently they were not considered; and manifestly no attempt was made to determine whether Johnson would have been able to substantiate fully his case had there been a trial on the merits.

The relevant facts are that Tuolumne desired a dredge but did not have the funds with which to build it. (Tr. 212) RFC loaned the funds to Tuolumne taking as security a first chattel mortgage on the dredge to be constructed (Tr.

34-37). In a simultaneous transaction Johnson agreed to build the dredge, waiving all liens to secure the purchase price and agreeing to abide by the terms of the chattel mortgage. (Tr. 192-3). The entire loan of $600,000 and Tuolumne's down payment of $50,000 were put into a Construction Fund, payments from which were subject to RFC control. (Tr. 38-39) This entire fund was to be used exclusively for construction of this dredge (Tr. 119) and the fund was large enough to pay for the dredge.

Thereafter, and while the final payment to Johnson for the dredge remained unpaid, RFC paid the last $100,000 of the loan into the Construction Fund, (Tr. 187) and then approved payment out of that fund of the entire balance for uses other than those originally designated (Tr. 412-13). Then, while Johnson was still not paid, it brought this foreclosure suit and asserts that its first mortgage is prior to Johnson's claim.

Johnson contends it has a prior lien. That claim rests primarily upon grounds of equitable estoppel. A case in point is:

> *Wichita Fed. Sav. & L. Ass'n v. Jones,* 155 Kan. 821, 130 P. 2d 556 (1942)

There the money lender with a first mortgage did not make the entire loan, and because of that, some of the suppliers of labor and material were not paid. They filed mechanic's liens. The Court held that, although the mortgage was expressly senior to the mechanic's liens, the mortgagee was estopped to set up that priority. The Court said at 130 P. 2d 559:

> "We are of opinion the materialmen in seeking information as to the source from which they were to be paid and learning that a mortgage had been made for

> the purpose of financing construction, had a right to rely thereon, at least to the extent that the amount of the loan would be advanced, whether they received it or not."

This principle of estoppel has frequently been invoked to prevent a mortgagee from asserting the priority of his lien when his conduct would render it unconscionable to enforce the security to the prejudice of another.

> "The holder of a mortgage on land may be estopped to assert the priority of his lien against a subsequent purchaser or encumbrancer by any act, conduct or omission of his own which would render it unconscionable to enforce the security to the other's prejudice."
>
> *Knox v. Kaelber,* 140 N. J. Eq. 474, 55 A. 2d 53 (1947).
>
> *Mitchell v. West End Park Co.,* 171 Ga. 878, 156 S.E. 888 (1931);
>
> *Northwestern Mut. Sav. & L. Ass'n v. Kessler,* 66 N. D. 737, 268 N.W. 692 (1936);
>
> *Title Guar. T. & S. Bank v. Clifton Forge Nat. Bank,* 149 Va. 168, 140 S.E. 272 (1927).

The *Title Guarantee* case illustrates why RFC cannot now profit from a situation where Johnson was induced by it to forego any lien on the dredge. In that case the defendant had a first deed of trust prior to plaintiff's claim, but failed to take steps to protect it, relying upon plaintiff's statements recognizing it. The Court said at p. 274:

> "After twice lulling the Clifton Forge Bank into security by conduct of this sort, the appellant cannot now be permitted to change front to the injury of appellee."

RFC, therefore, cannot claim that its mortgage is a lien on the dredge prior to Johnson's claim. Foreclosure of the

chattel mortgage by RFC, and sale, cannot affect the rights of the parties. Equity will transfer Johnson's lien to the proceeds of the sale and enforce it against RFC.

Pomeroy, Equity Jurisprudence, Vol. IV, Sec. 1080 (5th Ed. 1941)

Thus the decision below should be reversed with instructions that Johnson's claim is a prior lien to that of RFC's mortgage. At the very least Johnson should be permitted to present his case at trial.

B. Johnson's claim of lien was not "extinguished" by the statute of limitations.

After holding that Johnson had no lien, the court proceeded to say that even if it did have a lien, the lien was "extinguished" by the applicable six-year Federal statute of limitations (Tr. 265).

We contend that the court erred in applying the statute of limitations rather than the equitable doctrine of laches to Johnson's claim of lien. We have just shown in the preceding subsection of this section III of our brief that the lien which Johnson asserted was based upon grounds of equitable estoppel, supra, pages 38-9. Furthermore, RFC itself began the present suit as a suit in equity. It thus appears that this whole proceeding is essentially an equitable one. Therefore, the court below should not have applied the statute of limitations as a bar to Johnson's claim of lien.

Had the court applied laches rather than limitations, it would have had no difficulty in ascertaining that, at the very least, a genuine issue of fact existed on the question of laches. All the factual background that we reviewed

above applies with even greater force in a determination of laches.

The distinction is clearly brought out by Justice Frankfurter in *Holmberg v. Armbrecht,* 327 U. S. 382, 66 S. Ct. 589, 90 L. Ed. 743 (1946) where the opinion points out that if plaintiff's claim were a legal one, it would have been barred by the State statute of limitations, but because the suit was one in equity, the State statute of limitations was inapplicable. Then the opinion holds that laches was not a bar, saying:

> "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. See Russell v. Todd, supra (309 US at 289, 84 L ed 761, 60 S Ct 527). 'There must be conscience, good faith, and reasonable diligence to call into action the powers of the court.' McKnight v. Taylor, 1 How (US) 161, 168, 11 L ed 86, 88. A federal court may not be bound by a State statute of limitation and yet that court may dismiss a suit where the plaintiffs' 'lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence. * * *' Benedict v. New York, 250 US 321, 328, 63 L ed 1005, 1011, 39 S Ct 476. A suit in equity may fail though 'not barred by the act of limitations. * * *' McKnight v. Taylor, supra; Alsop v. Riker, 155 US 448, 39 L ed 218, 15 S Ct 162.
>
> "Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that 'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon

> some change in the condition or relations of the property or the parties.' Galliher v. Cadwell, 145 US 368, 373, 36 L ed 738, 740, 12 St Ct 873. See Southern P. Co. v Bogert, 250 US 483, 488, 489, 63 L ed 1099, 1106, 1107, 39 S Ct 533. And so, a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.''

We confidently assert that if there had been a trial, and the test of laches rather than limitations had been applied, Johnson's claims would not have been barred, nor would his lien have been declared ''extinguished.''

IV.

THE COURT ERRED IN HOLDING THAT RFC WAS NOT UNJUSTLY ENRICHED AND IN IGNORING ISSUES OF MATERIAL FACT BEARING UPON THE CLAIM OF UNJUST ENRICHMENT.

A. An unpaid contractor who has relied for payment upon a construction loan has an equitable lien on the loan fund to secure payment, and the lender who diverts part of the fund to other uses is to that extent liable to such contractor.

The trial court's error in granting summary judgment on the third ground of counterclaim is best illustrated by the court's conclusion (Tr. 271):

> ''Under the pleadings, the stipulation, and the exhibits in this case, Johnson has completely failed to establish 'unjust enrichment' on the plaintiff's part.''

Here again the court decided the case ''on the merits''; it failed utterly to realize that its task, under Rule 56, was

but to determine whether there was a genuine issue as to any material fact. In giving as its reason that "Johnson has completely failed to *establish* unjust enrichment * * *" (italics added), the court's action becomes palpably erroneous, since Johnson had no burden of "establishing" any fact at all on summary judgment procedure.

The court did concede that RFC was enriched (Tr. 270). It was enriched because it received all the earnings from the operation of the dredge (Tr. 270). It was further enriched in that it received the dredge as security for its first chattel mortgage while Johnson remained unpaid. Then by this very suit RFC sought to enrich itself even more by selling at foreclosure a security for which it has never fully paid, and pocketing the proceeds without using any part of them to pay for that security.

But although the enrichment is conceded, the court held that injustice was not established, relying on *Bailis v. RFC,* 128 F. 2d 857 (3d Cir. 1942). But the facts of the Bailis case are clearly not analogous as that case involved the sale of assets mortgaged to RFC without its consent. We submit that in cases with analogous facts, the courts have invariably given the unpaid contractor a remedy, basing the decision on one or another of several equitable theories.

The principles here applicable were developed by courts of equity in builders' cases. They may be summarized briefly by saying that the builder will be paid, and the lender must use all of the loan funds to pay him. Thus, when a bank or other lender lends a fixed sum of money to a property owner for construction of a building, taking a first mortgage or deed of trust for security which is prior to all mechanic's lien claims, then all of the loan fund must be devoted to costs of construction of the building until all

such costs are paid. That means, if any supplier of material or labor is not paid in full, that any unexpended portion of the loan fund is impressed with an equitable lien in favor of the unpaid suppliers, who to this extent come ahead of the mortgage.

Smith v. Anglo-Calif. Trust Co. 205 Cal. 496 (1928);
Pacific Ready-Cut Homes, Inc. v. Title Ins. & Trust Co. 216 Cal. 447 (1932);
Theatre Realty Co. v. Aronberg-Fried Co., Inc., 85 F. 2d 383 (8th Cir. 1936).

In the *Smith* case, the landowner borrowed from the bank to improve his property, giving a first deed of trust as security. $5000 was still unpaid to suppliers when the job was finished, and over $4000 of the construction loan was still in the hands of the bank. The court recognized that the deed of trust was senior to the liens of the suppliers, and that the bank had no duty to see to it that the money advanced was used to pay for labor and materials. However, the court emphasized that the suppliers relied upon the loan as the source of payment and, although there was no actionable wrong, intended trust, or third party beneficiary contract, these suppliers had an equitable lien in the unexpended portion of the loan fund. The bank was therefore directed to apply the $4000 in liquidation of the claims of the suppliers.

In the *Pacific Ready-Cut Homes* case this doctrine was applied under similar circumstances to prevent the lender from using the balance of the loan fund to reduce the amount owing on the loan. It was held that the lender with a first deed of trust which by its terms was senior to mechanic's liens was nevertheless liable to unpaid suppliers

until the loan fund was exhausted. The court said at p. 450, 452:

> "The *Smith* case, as appears from the foregoing quotation, was decided upon the dual grounds that the owner and the lender were estopped by their conduct to withhold the fund, and that the claimants had an equitable lien thereon. The essential basis of the opinion is the justifiable reliance upon the fund by the lien claimants. If similar reliance appears in the instant case, the former decision is controlling.
>
> * * *
>
> "The defendant mortgage company, having received the benefit of plaintiff's performance in the form of a completed building and therefore a more valuable security for its note, is not justified in withholding or appropriating to any other use money originally intended to be used to pay for such performance and relied upon by plaintiff in rendering its performance. The theory of equitable lien, as laid down in the *Smith* case, is quite broad (see 17 Cal. L. Rev. 411), and it is fully applicable to the instant case. (See, also, *Community Lumber Co. v. Chute,* 215 Cal. 268 (10 Pac. ((2d)) 57); *Community Lumber Co. v. California Pub. Co.,* 215 Cal. 274 (10 Pac. ((2d)) 60)."

Another California case has reached the same result on this same theory: that the builder has an equitable lien in the loan fund and all of this fund must be utilized to pay costs of construction.

> *San Mateo P. M. Co. v. Davenport R. Co.,* 218 Cal. 702 (1933).

Application of the equitable lien doctrine to facts closely resembling those here before the court is illustrated by

> *Theatre Realty Co. v. Aronberg Fried Co., Inc.,* 85 F. 2d 383 (8th Cir. 1936).

In that case, on March 8, 1927, a property owner agreed to issue bonds to the lender, secured by a first deed of trust, in order to finance construction of a building on the property. Knowing of this agreement and on the very next day, the plaintiff contracted to construct the building. The bonds were then issued under a deposit agreement whereby the loan was put in trust, part to be used to pay interest on the loan and the balance to be used to pay construction costs. The court held that an equitable lien attached to this trust fund, and the lender was liable to the partially unpaid plaintiff, irrespective of its first deed of trust. There, as here, the loan funds were placed in a special fund and were to be used to pay construction costs. In both cases, the builder knew of the loan, relied on it, and entered into the construction agreement almost simultaneously with the execution of the loan agreement. Then construction was completed and the builder was unpaid although a portion of the construction fund remained. And, just as RFC contends here, the lender in that case contended that its first deed of trust was a superior lien to any the unpaid builder might have.

In spite of this contention, the court held that there was an equitable assignment and also an equitable lien. The court emphasized the builder's reliance upon the loan as the source of payment. It held that the lender would be unjustly enriched if it were to receive the funds owed to the builder. The equitable lien, the court said, was based upon general considerations of justice, upon the principle that he who seeks the aid of equity must do equity, and the doctrine of unjust enrichment.

These same considerations have prompted courts in cases like the one at bar to protect the unpaid builder upon other theories.

Wichita Fed. Sav. & L. Ass'n v. Jones, 155 Kan. 821, 130 P 2d 556 (1942);

Whiting-Mead Co. v. West Coast B & M Co., 66 C.A. 2d 460 (1944).

In the *Wichita* case the court held that a mortgagee was estopped from asserting the priority of his first mortgage as against the unpaid materialmen.

The *Whiting-Mead* case applied yet another theory. There, the holder of the first deed of trust had not expended the full amount of the loan, and some costs of construction of the building had not been paid. The court held the unexpended balance of the loan was a trust fund for the benefit of the unpaid suppliers of labor and materials. Under this theory, RFC was duty bound to see to it that the Construction Fund was used solely for the originally intended purposes, until all bills were paid. It chose not to do so, and permitted it to be diverted to other uses. The trust was thus violated, and RFC, the trustee, became liable at least when it repudiated its obligation to pay Johnson at the close of Johnson's litigation with Tuolumne in 1949.

These many cases, based upon a diversity of equitable theories encompass the facts of the case here before the court. Indeed, of all the builders who have been unjustly treated, Johnson stands at the forefront.

The salient fact is that Tuolumne had no funds with which to construct a dredge, as everybody knew (Tr. 212-13). Tuolumne negotiated for months with RFC for a loan (Tr. 212). Then on May 11, 1937 Tuolumne, the Anglo-California National Bank and RFC entered into the "Indenture and Chattel Mortgage" (Tr. 17) to secure a loan by RFC to Tuolumne of $600,000 (Tr. 18), Tuolumne itself was to put up only $50,000 and the entire $650,000 was in

the Construction Fund to be used to pay for the dredge (Tr. 38-39).

Simultaneously Johnson and Tuolumne entered into the construction agreement, which is the basis of this action (Tr. 192), by which Johnson agreed to build the dredge for Tuolumne on a cost-plus basis with a $552,500 maximum (Tr. 200). This agreement between Tuolumne and Johnson was prepared in RFC's offices (Tr. 212). It bound the parties to the terms of the RFC resolution authorizing the loan and to the Indenture and Chattel Mortgage (Tr. 193, 194, 205). The entire transaction was manifestly a three-party deal.

By the construction agreement, Johnson was bound to deliver the dredge free of liens (Tr. 193-4), thus subjecting the dredge to RFC's first mortgage. Johnson retained no lien of any kind as security even though Tuolumne had no funds (Tr. 212) and in spite of the fact that Johnson knew RFC controlled Tuolumne's earnings (Tr. 47-50, 193). This was contrary to Johnson's usual practice of insisting on a reservation of title as security (Tr. 213). It is crystal clear, therefore, that Johnson could expect payment from only one source, the RFC loan, and Mr. Johnson stated that he relied upon, and looked to this fund alone for payment (Tr. 212).

RFC intended that Johnson should be paid out of the loan. The proceeds of the loan were to be used for certain specific purposes as shown on a list Mr. Johnson saw in RFC's offices (Tr. 398). They were to be used "exclusively" for construction of the dredge (Tr. 119) as everyone, including RFC and Johnson, knew (Tr. 119). The loan fund was large enough to pay Johnson in full, it was intended that Johnson be paid in full, and in fact it was the intent that almost the entire loan to Tuolumne would eventually be

paid to Johnson ($552,500 out of the $650,000 Construction Fund). RFC had complete control of the Construction Fund of $650,000, no payment from which could be made without written approval of RFC (Tr. 38-39). Nevertheless, RFC, knowing all these facts, and knowing that over $51,000 was still due to Johnson (Tr. 213-214), paid the remaining $100,000 of the loan into the Construction Fund and thereafter approved use of the entire balance in that fund for purposes other than those originally specified (Tr. 412-13). This RFC did although it had told Johnson that the last $40,000 would be held for Johnson (Tr. 409) and although Johnson was even then diligently attempting to collect the amount due from Tuolumne, as RFC well knew.

As a result of RFC's acts no available source of funds was left for the payment of Johnson's claim, except the earnings of the completed dredge, and these RFC controlled (Tr. 47-50) and appropriated solely to its own use (Tr. 417-18), leaving Johnson unpaid.

It is difficult to conceive of any enrichment more unjust than was this. This is a case which demands the intervention of a court of equity far more than did those cases, heretofore cited, wherein under one theory or another, the court insured that the builder got paid in spite of the lender's first mortgage. Yet these facts were not even mentioned by the court below in its opinion (Tr. 265-271).

Very obviously the court below was disturbed because it could not definitely determine from the limited record the scope of Johnson's claim. Consequently it felt compelled to write a letter to Johnson's counsel seeking a stipulation or some other means of clarification (Tr. 267). This action again demonstrates that the court misconceived completely the extent of its task on a motion for summary judgment.

For without this clarification, it proceeded to decide the case on the merits and to deny Johnson the chance to try his case.

Quite clearly, the court did not perceive the relevance of the equitable lien theory heretofore outlined. Yet the enforcement of equitable liens is by no means uncommon;

> "The equity courts look with favor upon equitable liens, and frequently such liens are employed to do justice and equity and to prevent unfair results." *Mannon v. Pesula,* 59 Cal. App. 2nd 597 (1943).

They are founded upon elemental principles of equity and good conscience.

> *Back v. Back's Adm'r,* 281 Ky. 282, 135 S.W. 2d 911 (1940);
>
> *Scott v. Kirtley,* 113 Fla. 637, 152 So. 721 (1934).

As the court said in:

> *Cleveland Clinic Foundation v. Humphrys,* 97 F. 2d 849, 856 (6th Cir. 1938) cert. den. 305 U. S. 678, 59 S. Ct. 93, 83 L. Ed. 403 (1938).
>
> "In the absence of an express contract, a lien based upon fundamental maxims of equity may be imposed and declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing."

See also:

> *Lindell v. Lindell,* 150 Min. 295, 185 N.W. 929 (1921);
>
> *Theatre Realty Co. v. Aronberg-Fried Co., Inc.,* supra.

It is not surprising, therefore, that unpaid builders and suppliers have universally been protected in circumstances such as this.

E.g., *Town of Covington v. Alonzo B. Hayden, Inc.*, 27 F. 2d 360 (5th Cir. 1928);

Security Fed. S. & L. Ass'n v. Underwood C & S Co., 245 Ala. 56, 16 So. 2d 100 (1943);

Anderson Inv. Co. v. Jones, 104 Wash. 142, 176 Pac. 17 (1918).

In the *Town of Covington* case, the Circuit Court of Appeals held it proper to impress a lien on the unused proceeds of a sewer bond issue in favor of the unpaid contractor. The court said:

> "There could be no doubt that the bonds disposed of were sold for the purpose of paying for the work to be done under appellee's contract, and that the proceeds were dedicated to that purpose * * *" (p. 360).

This language is in point here. Since the entire loan fund was earmarked for construction of the dredge and related uses (Tr. 37, 38, 119, 200), RFC's diversion of the moneys to other purposes was wrongful.

This diversion of funds is clearly one basis of RFC's liability. Once the lien attached to the moneys in the Construction Fund, it is manifest that RFC could not escape that lien by transferring the funds to third parties.

National Surety Co. v. County Bd. of Educ., 15 F. 2d 993 (4th Cir. 1926);

Cf. *Hadley v. Passaic Nat. B & T Co.*, 113 N. J. Eq. 548, 168 Atl. 38 (1933).

As the court said in the *Pacific Ready-Cut Homes* case, supra, 216 Cal. at 452:

> "The defendant mortgage company, having received the benefit of plaintiff's performance in the form of a completed building and therefore a more valuable security for its note, is not justified in withholding *or*

appropriating to any other use money originally intended to be used to pay for such performance'' (Italics added).

In another case it was said:

"The Pacific American Association made no promise either express or implied, to pay said claim. It had, however, certain funds in its hands to pay the cost of constructing said building, and it was in duty bound to apply said funds to that purpose.'' *San Mateo Planing Mill Co. v. Davenport Realty Co.,* 218 Cal. 702, 710 (1933).

RFC was in duty bound to apply the loan to pay the cost of constructing the dredge. When it failed to do so, and thereafter in 1949 repudiated all obligation to Johnson, it became liable.

The impressment of an equitable lien depends almost entirely upon the facts of the particular case, since the doctrine rests upon principles of equity and good conscience.

E.g., *Mannon v. Pesula,* 59 C.A. 2d 597 (1943).

The right of action is necessarily uncertain:

"It is necessarily the case that something of vagueness and uncertainty should attend a doctrine that is of such wide and varied application as is this of equitable lien * * *'' *Society of Shakers v. Watson,* 68 Fed. 730, 739 (6th Cir. 1895), cert. denied, 163 U. S. 704, 16 S. Ct. 1206, 41 L. Ed. 313 (1895).

The right to such a lien depends, not alone upon the writings or agreements in the case, but upon all the "attendant circumstances.''

Walker v. Brown, 165 U. S. 654, 173 S. Ct. 453, 41 L. Ed. 865 (1897).

Only by a full trial on the merits could all the pertinent facts be brought forth. By denying Johnson the right to trial, the District Court effectively prevented Johnson from developing the myriad facts which cumulatively would have established beyond fear of contradiction both the right of action and the date of its inception. That was error, and the judgment should be reversed.

B. A lender who holds a first mortgage senior to mechanic's liens and a second mortgage junior to such liens upon property constructed by the unpaid lienholders, is unjustly enriched when it applies the earnings from that property to payment of the mortgages without first paying the costs of construction.

The unjustness of RFC's enrichment is palpable, if all the facts in the record are considered. At the very least, there was a genuine issue as to the facts on this point, making the summary judgment improper.

It is a basic principle in the law that a contractor shall be paid. The common law gave those who constructed or sold goods, or even repaired them, a lien to secure payment, and such liens have been incorporated into the law of most jurisdictions, including California.

California Civil Code, Sections 3046 et seq.

Contractors are specifically provided for by mechanic's lien statutes, the purpose of which is to insure payment for work done and materials furnished.

California Code of Civil Procedure, Sections 1181 et seq.

These concepts have been applied and reinforced over and over again by the courts of California and other states.

> "The law contemplates that when one receives a benefit at the expense or detriment of another, he should compensate the latter to the extent of the reasonable value of the benefit received." *Leoni v. Delany,* 83 C.A. 2d 303, 307 (1948).
>
> "When one person performs services for another, the law raises an implied promise to pay a reasonable compensation therefor." *Lazzarevich v. Lazzarevich,* 88 C.A. 2d 708, 721 (1948).

Johnson has not been paid. Although its claim is in form against Tuolumne, it was recognized from the outset that Tuolumne had no funds with which to pay for the dredge (Tr. 212). Nevertheless Johnson waived all liens and subordinated its claim to RFC's mortgage (Tr. 193-4). To what, then, did Johnson look for payment?

Only two sources of funds were available from which to pay for the dredge: first, the Construction Fund into which the RFC loan was paid; and second, the earnings from the completed dredge. By the terms of the Indenture RFC had complete control over both of these sources of funds, and all other assets which Tuolumne had (Tr. 38-39, 47-50).

Johnson looked to the first source for payment, as Mr. Johnson stated (Tr. 212). Obviously RFC knew this, and this fund was to be used exclusively to pay for the dredge (Tr. 119). Nevertheless, RFC permitted the balance of the Construction Fund to be diverted to uses other than those for which it was originally designated (Tr. 412-413). It did this knowing that Johnson was owed some $51,000 (Tr. 214). Thus the intended source of funds to pay Johnson was destroyed and Johnson was left only with a claim against Tuolumne. Since Tuolumne had no other assets, the only other source of funds for payment was the earnings from the dredge itself. RFC had complete control over the disposition of these earnings also (Tr. 47-50).

Having dissipated the Construction Fund, RFC should have used these earnings from the dredge Johnson built to pay Johnson for building it. Instead RFC took the net earnings unto itself (Tr. 417-18). Not only did it apply them to payments on the first mortgage, it used $120,000—more than enough to pay Johnson's entire claim—to completely pay off the second mortgage which was equitably a junior lien to Johnson's claims (Tr. 184-5). Thus the earnings, the only remaining source of funds, were likewise applied entirely to other uses.

Whether it was intentional or not, RFC took control of all Tuolumne's assets, actively aided Tuolumne in resisting Johnson's claim and even provided funds for that purpose (Tr. 218), took all of Tuolumne's earnings as long as there were any earnings, refusing to use any of them to make the final payment on the dredge, and then left Tuolumne insolvent and unable to pay Johnson for the dredge. Thus, although the original agreements of May 11, 1937 contemplated that Johnson would be paid, and that RFC, who controlled all possible sources of payment, would release funds for such payment, RFC diverted *all* the funds to other uses. Now it piously asserts that insolvent Tuolumne alone is liable, in spite of the fact that neither Johnson nor RFC ever expected that Tuolumne itself would pay for the dredge.

The doctrine of unjust enrichment was tailor-made for this case.

> "The doctrine of unjust enrichment * * * applies to situations where as a matter of fact there is no legal contract, but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another." *Matarese v. Moore-McCormack Lines,* 158 F. 2d 631, 634 (2d) (1946).

See

Restatement, Restitution, Sec. 1 (1937)

One who is unjustly enriched may be required to make restitution both in equity and in law.

> "* * * the rule is that irrespective of the intent of the party to be charged, liability arises when one is enriched and receives a benefit at another's expense for which equitably he ought to pay. It has been held in a variety of circumstances that when such a situation occurs a contract to pay is implied in law." *Ross Engineering Co. v. Pace,* 153 F. 2d 35, 45 (4th Cir. 1946).

The obligation is implied in law, meaning it is created by operation of law. As the court said in

Old Men's Home, Inc. v. Lee's Estate, 191 Miss. 669, 4 So. 2d 235, 236 (1941)

speaking of implied in law contracts:

> "Such contracts rest upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another."

This is one of the basic principles upon which many of the equitable lien cases rest.

Theatre Realty Co. v. Aronberg-Fried Co., Inc., 85 F. 2d 383 (8th Cir. 1936);

Knabb v. Mabry, 137 Fla. 530, 188 So. 586 (1939);

Scott v. Kirtley, 113 Fla. 637, 152 So. 721 (1934).

Here, RFC's liability is implied by law because of its conduct.

> "An implied contract is one that 'is inferred from the conduct, situation or mutual relation of the parties and enforced by the law on the ground of justice.' (*Jennings v. Bank of California,* 79 Cal. 323 (21 Pac. 852,

12 Am. St. Rep. 145, 5 L R.A. 233).)" *Grant v. Long*, 33 C.A. 2d 725, 736 (1939);

"It is elementary that 'implied contract has its foundation in the doctrine of unjust enrichment.' 26 American Law Reports 562." *Anderson v. Doolittle*, 97 C.A. 2d 836, 837 (1950).

In the case at bar liability can be imposed upon RFC because a direct promise by RFC to pay Johnson can be implied from the facts. (Tr. 212-14).

"The law will imply a contract from the circumstances." *City Ice and Fuel Co. v. Bright*, 73 F. 2d 461, 464 (6th Cir. 1934).

"An implied contract is one, the existence and terms of which are manifested by conduct." (Civ. Code, Sec. 1621). An implied contract is one that is inferred from the conduct, situation, or mutual relations of the parties, and enforced by law on the ground of justice. (Jennings v. Bank of California, 79 Cal. 323 * * *" *Medina v. Van Camp Sea Food Co.*, 75 C.A. 2d 551, 553-4, 171 P. 2d 445, 447 (1946).

Here RFC and Tuolumne prepared the Tuolumne-Johnson agreement and RFC reviewed the entire transaction (Tr. 212). Mr. Johnson told RFC that he was looking for payment solely to the funds advanced by RFC (Tr. 212). Everyone, including RFC, knew that Tuolumne alone could not pay for the dredge absent the loan (Tr. 212-13). Johnson was willing to enter the deal and waive a lien on the dredge only because of, and in reliance on, the RFC loan (Tr. 213-14, 395-96). The fund was large enough to pay for all costs of constructing the dredge, including the entire Johnson claim. The RFC funds were to go into a Construction Fund and to be paid out of that fund only with RFC approval (Tr. 38-39). These funds were to be used solely

for construction of the dredge (Tr. 39, 119) as everyone including RFC and Johnson knew (Tr. 119). Mr. Johnson was shown a list in the RFC offices giving all the purposes for which the fund was to be used (Tr. 398). It was clearly tacitly understood by all, and agreed by RFC that this money was to go to Johnson to pay for the dredge. It is clear, therefore, that in essence RFC was to pay Johnson for the dredge, using the Construction Fund as a means of insuring that payment was not made until the work was properly completed.

RFC never doubted its liability nor contested it. Upon many occasions between 1944 and 1947 Mr. Macartney of RFC told Mr. Johnson

> "* * * that as soon as the Federal court case (between Johnson and Tuolumne) was finally determined in our (Johnson's) favor, if it was, RFC would arrange to pay Johnson Company." (Tr. 219).

It is submitted that all of the parties originally contemplated that Johnson would be paid by RFC by use of the loan fund; that when RFC diverted the final portion of this fund to other uses, both it and Johnson assumed that RFC became individually liable to this extent to Johnson, and RFC expected to pay if Johnson's suits against Tuolumne proved successful. Not until 1949 did RFC change its stand. But its obligation to pay remained. Its duty to pay may be implied from the circumstances, and its liability to pay may be imposed to prevent unjust enrichment.

We submit that RFC must make restitution.

> *Restatement, Restitution,* Sec. 1 (1937)
>
> "Section 1. Unjust Enrichment.
>
> A person who has been unjustly enriched at the expense of another is required to make restitution to the other.
>
> * * *

"Comment:

a. A person is enriched if he has received a benefit (see Comment b). A person is unjustly enriched if the retention of the benefit would be unjust * * *"

RFC's unjust enrichment is three-fold. *First,* Johnson provided the security for both RFC's first mortgage and its second mortgage while RFC used the funds designated for building the dredge to make later repairs on it, or for some such purpose (Tr. 413).

Second, RFC took the earnings, leaving Tuolumne nothing with which to pay Johnson. That was the very essence of injustice.

Finally, by this suit RFC seeks to foreclose its first mortgage, sell the dredge and take all the proceeds, still without paying for the dredge.

V.

THE COURT ERRED IN HOLDING THAT RFC WAS ENTITLED TO APPROPRIATE THE PROCEEDS OF OPERATING THE DREDGE WHILE JOHNSON REMAINED UNPAID FOR CONSTRUCTING IT. THE COURT FAILED TO CONSIDER WHETHER SUCH APPROPRIATION CONSTITUTED A CONSTRUCTIVE FRAUD AND CONVERTED RFC INTO A CONSTRUCTIVE TRUSTEE.

A. RFC's appropriation of the earnings of the dredge amounted to a constructive fraud against Johnson and resulted in RFC's becoming a constructive trustee.

It is Johnson's contention that RFC's appropriation of all the earnings of the dredge was a constructive fraud on Johnson, and that RFC holds such earnings as a constructive trustee for Johnson. This contention the court below summarily dismissed by saying

> "There is absolutely nothing in the record to support a charge of dishonesty on the part of plaintiff." (Tr. 272.)

We respectfully urge that the court erred in at least two respects. First it again evidenced its erroneous view that on a motion for summary judgment under Rule 56, the party seeking relief must prove his case. That is not required. The court's duty is not to decide the case, but to determine whether or not there are genuine issues of fact to be tried.

Secondly, the court completely misconceived Johnson's claim. Johnson's fourth cause of counterclaim sets forth that RFC "did improperly and unlawfully pay to itself from the proceeds of the operation of the dredge * * *" and that RFC had full knowledge of Johnson's rights " * * * but in fraud of such rights appropriated to itself all of the proceeds * * *"

Even under rules of pleading far more strict than those prescribed by the Federal Rules, this cause of action would not be limited to a claim of deliberate dishonesty or intentional fraud. In fact the clear implication is a charge of constructive fraud, and indeed that is what Johnson does claim. By refusing to consider this claim, the court below committed error, and its decision should be reversed.

The rule is that when one acquires title to property to which another has a better right, a court of equity will convert him into a constructive trustee.

> *Crosby v. Clark,* 132 Cal. 1 (1901);
> *Johnson v. Clark,* 7 C. 2d 529 (1936).
>
> "A constructive trust is imposed not because of the intention of the parties but because the person holding the title to the property would profit by a wrong or would be unjustly enriched if he were permitted to

keep the property. A constructive trust, unlike an express trust or resulting trust, is remedial in character. (Restatement, Trusts, Vol. 2, p. 1249)." *Sampson v. Bruder,* 47 Cal. App. 2d. 431, 435 (1941).

A court of equity will raise a constructive trust for the purpose of working out right and justice in the most efficient manner.

Pomeroy, Equity Jurisprudence, Vol. 1, Sec. 155; Vol. 4, Sec. 1044 (5th ed. 1941);
Scott on Trusts, Vol. 3, Sec. 462.2 (1939).

When RFC appropriated to itself the earnings from the dredge to which Johnson had a better right under all the circumstances, RFC became a constructive trustee.

This is but another equitable remedy which will serve to right the wrong Johnson suffered. The gist of that wrong is that RFC induced Johnson to build the dredge and waive its lien in reliance upon the RFC loan (Tr. 212-14). Then RFC, which had complete control over both Tuolumne's assets and its earnings, used the Construction Fund (consisting of Tuolumne's down payment and RFC's loan) for other purposes and then took the earnings for itself. Johnson was left unpaid with a claim against Tuolumne, which by this time was insolvent. Then by this suit RFC seeks to sell and take the proceeds of the only asset of value Tuolumne has, which ironically is the very dredge which Johnson built but for which Johnson was not fully paid.

Aside from all other reasons for converting RFC into a constructive trustee, it seems apparent that the confidential relation RFC held toward Johnson will alone serve as sufficient basis for use of this equitable remedy. This confidential relationship stemmed from the fact that by the original three-party deal of May 11, 1937, RFC obtained

control over Tuolumne's assets and earnings and therefore all possible sources of funds to which Johnson could look for payment. RFC thus had a duty to be fair with Johnson and to use that control so as not to prejudice Johnson's rights. This it did not do; it violated that trust and it should not now be permitted to retain the fruits of that wrong, be it only a constructive wrong.

> "A constructive trust may be imposed when a party has acquired property to which he is not justly entitled, if it was obtained by actual fraud, mistake or the like, or by constructive fraud through the violation of some fiduciary or confidential relationship." *Mazzera v. Wolf,* 30 Cal. 2d 531, 535 (1947).

A trust or agency relationship in the strict sense is not required to establish a constructive trust; it is the special facts of the individual case which govern:

> "Constructive trusts of this form are not based primarily on the intention of the parties but are forced on the conscience of the trustee by equitable construction and the operation of law. (Millard v. Hathaway, 27 Cal. 119). In such trusts, based upon fraud or wrongdoing, an oral promise is sufficient and the existence or absence of a confidential relationship between the parties, in the strict sense, is not controlling." *Rankin v. Satir,* 75 Cal. App. 2d 691, 695 (1946).

Not only does RFC hold the earnings of the dredge as a constructive trustee, it must likewise hold any proceeds from sale of the dredge in trust for Johnson until Johnson is paid in full.

The Construction Fund itself was held by RFC in trust for Johnson, to be used for the purposes originally designated.

> *Whiting-Mead Co. v. West Coast B & M Co.* 66 C.A. 2d 460 (1944).

When RFC permitted the monies remaining in that Fund to be put to other uses, and when it denied its obligation to pay for the dredge, it violated its trust and became liable to Johnson for the full amount due.

B. The statute of limitations does not begin to run against a constructive trustee until repudiation of the trust.

It is well recognized that the statute of limitations does not begin to run against a constructive trustee until he repudiates the trust by some word or deed sufficient to notify the person for whose benefit the constructive trust is imposed of the repudiation.

The case of *Oldland v. Gray,* 179 F. 2d 408 (10th Cir. 1950) supports this statement fully. In impressing a constructive trust upon the property for the plaintiff's benefit, the court stated:

> "Nor is the claim barred by laches or limitations. Equity does not bar a claim of this kind unless it is equitable to do so. Time does not begin to run against a trust until it is openly disavowed by the trustee."

In *Strausburg v. Connor,* 96 C.A. 2d 398 (1950), the grantor sought to cancel a deed for failure of the grantee to pay the full purchase price. The court held that the statute of limitations did not begin to run against the grantor until the defendant had demanded exclusive possession of the land. To support its conclusion, the court said:

> "Appellant pleads the statute of limitations as embodied in various sections of the Code of Civil Procedure, but the record signally fails to substantiate her contentions. Where property is obtained under the circumstances and by the means shown here the obligation to make restitution is a continuing one and the statute does not begin to run until the trustee repudiates the

control over Tuolumne's assets and earnings and therefore all possible sources of funds to which Johnson could look for payment. RFC thus had a duty to be fair with Johnson and to use that control so as not to prejudice Johnson's rights. This it did not do; it violated that trust and it should not now be permitted to retain the fruits of that wrong, be it only a constructive wrong.

> "A constructive trust may be imposed when a party has acquired property to which he is not justly entitled, if it was obtained by actual fraud, mistake or the like, or by constructive fraud through the violation of some fiduciary or confidential relationship." *Mazzera v. Wolf,* 30 Cal. 2d 531, 535 (1947).

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trust. (*Svistunoff v. Svistunoff,* 94 Cal. App. 2d 651 (211 P. 2d 352); *Steinberger v. Steinberger,* supra."

See also:

Prussing v. Prussing, 46 CA 2d 347 (1941);
O'Brien v. O'Brien, 50 C.A. 2d 658 (1942);
Howard v. Howe, 61 F. 2d 577 (CCA 7th Cir. 1932);
Steinberger v. Steinberger, 60 C.A. 2d 116 (1943);
Svistunoff v. Svistunoff, 94 C.A. 2d 651 (1949).

The record in this case, incomplete as it is, shows clearly that RFC as a constructive trustee recognized its obligation many times to pay Johnson if Johnson won its suit against Tuolumne (Tr. 215, 216, 217-18, 219). It is clear from these statements, which RFC has not contradicted by affidavit, that responsible officials in the mining division and the legal division of RFC never at any time before the successful conclusion of Johnson's suit against Tuolumne repudiated RFC's obligation to pay Johnson if it prevailed in that litigation. It was not until after Johnson finally won that suit that RFC shifted position, refusing to pay Johnson because it thought that the legal question was a "close one." (Tr. 239).

Since wrongful detention from Johnson is the essence of the wrong, it is quite clear that RFC did not repudiate its obligation to pay Johnson until 1949, and for that reason the statute of limitations did not begin to run in favor of RFC until that time. At the very least Johnson should have been afforded an opportunity to present evidence at a trial to expand and sharpen the proof it has already presented by way of affidavits and deposition on this point. To deny Johnson that opportunity was prejudicial error.

VI.

THE COURT ERRED IN HOLDING ON SUMMARY JUDGMENT THAT RFC WAS NOT LIABLE FOR PAYMENT OF THE SALES TAXES ON THE DREDGE SINCE THERE WERE GENUINE ISSUES OF FACT UPON WHICH SUCH LIABILITY WAS PREDICATED.

At the time the contract between Johnson and Tuolumne was entered into, it was thought that there would be no sales tax payable on the price of the dredge (Tr. 148). However, the parties anticipated that such a tax might be assessed so they provided in Article X of the construction contract (Tr. 199-203) that "sales taxes paid thereon, if any, and in accordance with Article XIII," should be a proper charge against the revolving fund which in turn would be replenished from the Construction Fund over which RFC had control. Further in the construction contract, Johnson and Tuolumne treated the sales tax problem specifically.

> "Article XIII. Any sales taxes required to be paid to the State of California upon any of the transactions described in this agreement, not including, however, such taxes upon purchases of tools, equipment, and machinery of the second party for its use in the prosecution of the work, are to be paid by the first party and shall not be considered as a part of the maximum guaranteed price heretofore set forth but shall be put into said revolving fund in addition to said maximum guaranteed price, but the second party will not be entitled to charge or receive ten (10%) percent thereof or any other amount on account of such payment." (Tr. 204).

It should be noted here that Mr. Johnson in his letter of June 30, 1944 to Mr. Kuehl, chief counsel of the Mining Division of RFC, stated:

> "The matter of the sales tax was discussed by all parties concerned and with representatives of your legal

and engineering departments during the time the terms of the contract were developed and written." (Tr. 163)

As the construction contract was negotiated and drafted under RFC supervision and control, it is clear that RFC tacitly agreed to approve any sales tax assessed on the price of the dredge as a legitimate charge on the Construction Fund. It is equally clear that RFC tacitly agreed that any sales tax would be a proper charge, if necessary, against the earnings of Tuolumne contained in the trust fund set up by Article IV of the Indenture (Tr. 47-50) which was under RFC control (Tr. 48). In effect, the parties were to consider any such taxes, if they arose, as a cost item of the dredge. It is obvious that they would be a cost as they would not be assessed on profits but on the full price of various cost items used in the construction.

In early 1941, after the completion of the dredge, the State Courts of California established the right of the State to collect a sales tax on work done under contracts similar to the construction contract in this case (Tr. 148). Johnson, required by California law to pay the tax in the first instance as contractor, protested but its protest was denied (Tr. 141). It subsequently paid the balance of taxes due plus a ten percent penalty and accrued interest. It has never been repaid (Tr. 89).

When Johnson paid the amount due on account of the tax, it became entitled to reimbursement. According to the terms of Article XIII of the construction contract, this amount became a cost of the dredge so RFC's duty to see that Johnson was reimbursed was the same as its duty to see that the Construction Fund was properly expended to pay Johnson's other claims. It is interesting to observe that when Johnson and RFC nearly settled their differences in

1951, the sales tax was one of the items included in the proposed settlement by RFC. In a letter to Mr. Johnson dated August 15, 1951, Mr. McCullough of RFC stated:

> We are instructed to advise you that this Corporation will complete the pending foreclosure and, if and when the underlying collateral is acquired, it will be sold to your company without representation or warranty for $154,276.93, that being the difference between the proposed sales price of the dredge and $70,723.07 representing the face amount of your judgment *and claim for taxes* against Tuolumne Gold Dredging Corporation, upon condition that you dismiss your counterclaims with prejudice and execute a release in full in manner and form satisfactory to our legal counsel. (Tr. 224-5). (Italics added).

Furthermore, Mr. Johnson stated in his answer to Interrogatory No. 19 that payment of all sales taxes was repeatedly approved by many persons connected with RFC and particularly Mr. McCartney (Tr. 117).

On this question, as on other items previously discussed, our contention is that RFC's liability depends not merely upon the terms of the 1937 indenture and construction contract, but also on the dealings and negotiations between the parties. Therefore, we submit there were genuine issues of fact upon which the liability of RFC was predicated and the court should not have summarily denied trial on this issue.

CONCLUSION

We have shown it is the law that when a lender establishes a trust fund for the purpose of paying a builder, and the builder, who would otherwise have a lien upon the building, relies instead upon the trust fund for payment, the lender will be liable to the builder if he then diverts the trust fund to other purposes.

We have shown that the question of RFC's liability involves substantial issues of fact, such as the intent of the parties, Johnson's reliance on the trust fund, the many dealings and negotiations between the parties, the practical construction of its obligations as shown by RFC's conduct, the appropriation by RFC of the proceeds of operation of the dredge, and the question whether this enrichment was unjust.

Moreover, we have shown that in instances where a party admits liability, but requests deferment of suit until other litigation is concluded, such party cannot later assert the statute of limitations, if suit is brought seasonably after termination of the other litigation.

We have shown that there is much evidence to the effect that RFC admitted its liability to Johnson, but asked deferment of its demands until other litigation was concluded. We have shown that the doctrine of equitable estoppel to assert limitations depends on the acts and conduct of the parties which is certainly a genuine issue of fact in the instant case.

We have shown that the District Judge misconceived his limited powers and duties in passing upon a motion for summary judgment. We have shown that he did not refer to the factual issues at all. Yet he purported to decide some of Johnson's claims "on the merits." And he purported to apply the statute of limitations to other claims completely ignoring substantial factual reasons which prohibit the assertion of the statute of limitations. We have shown that in the similar case of *Begnaud v. White,* 170 F. 2d 323 (CCA 5-1940) the failure to recognize the issue of equitable estoppel as a bar to limitations was reversible error.

Johnson was entitled to a trial on the merits. Johnson was entitled to its day in court. It was entitled to put Mr. John-

son on the stand, so that he could personally present his facts to the court in full and without summary deprivation of the right of full hearing. He has been denied this fundamental right afforded by our judicial system. Therefore the summary judgment should be reversed.

Respectfully submitted,

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Attorneys for Appellant

Dated: San Francisco, California
April 19, 1954